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In the Supreme Court of the United States

OCTOBER TERM, 1980

RAY TAMARGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the charges against him were improperly based on regulations that were no longer in effect at the time he engaged in the conduct for which he was prosecuted.

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on six counts of mail fraud, in violation of 18 U.S.C. 1341, and six counts of misapplication of funds granted under the Comprehensive Employment and Training Act (CETA), in violation of 18 U.S.C. 665(a). He was sentenced to concurrent terms of three years' imprisonment on the mail fraud counts and one year's imprisonment on the misapplication counts. The court of appeals affirmed (Pet. App. A-1 to A-12).

The evidence at trial showed that petitioner obtained federal funds under the CETA program on the representation that the funds would be used to provide on-the-job training for unemployed or underemployed workers. Instead of providing such training, petitioner used the funds to defray the salary expenses of ordinary employees, a purpose expressly prohibited by the governing federal statute and by the contract between petitioner's corporation and the federal government.

Through that corporation, petitioner in 1975 purchased a group of bars in Tampa, Florida that were referred to colloquially as "black bars." They operated on a "package store" basis, selling liquor by the bottle to, primarily, black patrons who would consume it on the premises. "Black bar" employees performed relatively simple tasks such as operating a cash register, keeping inventory, and counting money. The evidence at trial showed that a new employee could be taught to operate one of the bars in a single day (Pet. App. A-4).

Shortly after his corporation purchased the bars, petitioner applied to serve as a sponsor for a CETA job-training program. Following negotiations, he entered into a contract with the local CETA agency, pursuant to which the agency agreed to pay petitioner's corporation a sum of money to defray its costs for providing six weeks of training to several employee-trainees. The contract amount was pegged at 50% of the salary paid by petitioner to the employees (Pet. App. A-5). Petitioner agreed in writing that his corporation would "employ and train" bar managers, accounting clerks, and carpenters during this period and would provide "continuous and timely job instruction * * * by a qualified instructor." He also agreed to comply with all

CETA regulations applicable to the job training program (Pet. App. A-16 to A-17).[1]

Shortly after negotiating the initial contract, petitioner arranged to have it modified to extend the training period to 20 weeks for bar managers and accounting clerks and 16 weeks for carpenters. During this extended period, CETA would continue to pay an amount equal to 50% of the employees' salaries. When asked if training was being provided to the employees, petitioner assured CETA officials that it was; he added that the extension was necessary to complete the employees' training (Pet. App. A-7 to A-8).

Contrary to petitioner's representations to the CETA agency, the evidence showed that the CETA-supported employees received little or no training.[2] Rather, petitioner used the CETA program as a source of subsidized unskilled labor, in direct contravention of the governing CETA regulations.[3] He replaced his regular employees with CETA

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[1]The contract reprinted in the appendix to the petition, while identical in form to the contracts described in the text, covered a later group of "trainees."

[2]The evidence showed that most of the CETA-supported employees who worked in petitioner's bars received from 10 minutes' to one hour's instruction in operating the establishments, after which they virtually were left on their own (Pet. App. A-6). The carpenter and accounting clerk were already experienced in their fields and received no training at all (Pet. App. A-6 to A-7).

[3]29 C.F.R. 95.33(d)(2) provides, in pertinent part:

> (ii) Prime sponsors may provide payments or other inducements to public or private employers for the bona fide training and related costs of enrolling individuals in the program: *Provided*, that payments to employers organized for profit are only made for the costs of recruiting, training and supportive services which are over and above those normally provided by the employer. Use of a formula which incorporates the trainee's wage as a factor and fixed unit cost contracting are acceptable methods of reimburse-

"trainees" in order, as he told one of the managers, to cut the payroll (Pet. App. A-6). He gave no instructions to any of his employees regarding training, and no training was provided. Each applicant for employment at one of petitioner's bars was sent first to CETA and then referred back to petitioner, so that petitioner's corporation could claim the CETA training reimbursement (*ibid.*). Invoices seeking reimbursement were sent by the corporation to the CETA agency through the United States mail.

2. Petitioner contends that his convictions were based not on the requirements of CETA, but on the requirements of a predecessor statute, the Manpower Development Training Act of 1962 (MDTA), 42 U.S.C. (1964 ed.) 2584, which was repealed prior to the conduct at issue in this case. That is so, argues petitioner (Pet. 7), because the contract he signed with the local CETA agency was drawn up on a form designed to reflect the detailed on-the-job training standards fixed by the MDTA and its implementing regulations rather than the more lenient standards of CETA. Therefore, concludes petitioner, he was in effect convicted of violating a repealed statute.

The short asnwer to petitioner's claim is that whether or not CETA (as distinct from the MDTA) required that he provide "continuous and timely job instruction * * * by a qualified instructor," petitioner agreed to do so in exchange for CETA funds. Furthermore, he agreed to comply with pertinent CETA regulations, including a regulation limiting the use of training funds to the costs of "recruiting, training and supportive services which are over and above those

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ment to private-for-profit employers for extraordinary training costs associated with providing on-the-job-training. * * *

(iii) Direct subsidization of wages for participants employed by private employers organized for profit is not an allowable expenditure (sec. 101(5)).

normally provided by the employer," and expressly prohibiting the use of training funds as wage subsidies.[4] After the training program supposedly had begun, petitioner assured CETA representatives that the contracted-for training in fact was being provided and, indeed, that an extension was needed in order to complete the task. However, as the evidence outlined above showed, that statement was false; petitioner did not provide, and had no intention of providing the agreed upon training, nor any training at all. Instead, he used the CETA funds for a clearly prohibited purpose—to subsidize his payroll. In so doing, petitioner breached his contract with CETA, violated CETA regulations, and made material misrepresentations to CETA officials. While this course of conduct quite probably would have violated the MDTA, it without doubt constituted a fraud upon the CETA program and a misallocation of CETA funds, the crimes of which petitioner properly stands convicted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[4]The regulation does, however, permit private employers to use wages as a factor in determining the costs of (and, hence, the reimbursement for) training. See note 3, *supra*.